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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Sanaa El Musselmani,  
Plaintiff,  
v.  
Martin O'Malley,<sup>1</sup>  
Commissioner of Social Security,  
Defendant.

No. CV-22-0464-TUC-EJM

**ORDER**

Currently pending before the Court is Plaintiff Sanaa El Musselmani's Opening Brief (Doc. 16). Defendant filed his Answering Brief ("Response") (Doc. 20), and Plaintiff replied ("Reply") (Doc. 21). Plaintiff brings this cause of action for review of the final decision of the Commissioner for Social Security pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). Compl. (Doc. 1).

Based upon the parties' pleadings and the administrative record submitted to the Court, undersigned REVERSES and REMANDS the Commissioner's decision for further consideration.

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<sup>1</sup> The Court takes judicial notice that Kilolo Kijakazi is no longer Acting Commissioner of the Social Security Administration ("SSA"). The Court will substitute the new Commissioner of the SSA, Martin O'Malley, as Respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. *See also* Fed. R. App. P. 43(c)(2).

## I. BACKGROUND

### A. *Procedural History*

On May 6, 2020, Plaintiff protectively filed a Title XVI application for Supplemental Security Income (“SSI”), alleging disability as of January 1, 2020, due to back pain, epilepsy, and high cholesterol. *See* Administrative Record (“AR”) at 13–15, 20, 64, 66, 84, 86–87, 96–98, 113, 115, 205, 215, 239, 242, 267, 277.<sup>2</sup> The Social Security Administration (“SSA”) denied this application on July 21, 2020. *Id.* at 13, 84–95, 115–18. On September 1, 2020, Plaintiff filed a request for reconsideration, and on March 9, 2021, SSA denied Plaintiff’s application upon reconsideration.<sup>3</sup> *See id.* at 13, 96–113, 119–22, 131–33. On March 24, 2021, Plaintiff filed her request for hearing. *Id.* at 13, 135. On September 20, 2021, a telephonic hearing was held before Administrative Law Judge (“ALJ”) Peter Baum. *Id.* at 13, 62–83. On September 30, 2021, the ALJ issued an unfavorable decision. *Id.* at 10–21. On November 29, 2021, Plaintiff requested review of the ALJ’s decision by the Appeals Council, and on September 15, 2022, review was denied. *Id.* at 1–6, 202–204. On October 5, 2022, Plaintiff filed this cause of action. Compl. (Doc. 1).

### B. *Factual History*

Plaintiff was fifty-six (56) years old at the time of the alleged onset of her disability and fifty-eight (58) years old at the time of the administrative hearing. *See* AR at 13, 19, 64, 79–80, 84, 86–87, 96–98, 113, 191, 205, 215, 239, 242, 267, 277. Plaintiff finished high school. *Id.* at 19, 66, 80, 84, 113, 243. Plaintiff has not worked prior to her alleged disability. *See id.* at 227–38, 259, 266.

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<sup>2</sup> Page numbers refer to the page numbers demarcated in the Administrative Record rather than the Court’s Case Management/Electronic Case Files (“CM/ECF”) page numbers.

<sup>3</sup> The ALJ’s decision lists March 8, 2021 as the date of denial upon reconsideration; however, the letters are dated March 9, 2021. *Compare* AR at 13, *with* AR 131. The Court presumes that the ALJ’s date was merely a typographical error.

1                   **1. Plaintiff's Testimony**

2                   **a. Administrative Hearing**

3           At the outset of the hearing, Plaintiff's counsel noted that Plaintiff's native language  
4 is Lebanese Arabic. AR at 65–66. Plaintiff confirmed that she had graduated from high  
5 school, but did not attend university. *Id.* at 66. Plaintiff reported that she had not worked  
6 since she had filed for disability benefits on May 6, 2020. *Id.* at 66–67. Plaintiff testified  
7 that she is living in her sister's home and recently began receiving nutrition assistance. *Id.*  
8 at 67. Plaintiff reported that she does not drive. *Id.* at 67–68. Plaintiff testified that she  
9 calls the Banner shuttle for transportation to and from her medical appointments, and  
10 sometimes a family member drives her. AR at 68.

11           Plaintiff confirmed that she suffered a compression fracture in her back from a car  
12 accident. *Id.* at 69. Plaintiff reported that the accident also resulted in a broken pelvis and  
13 a rod being placed in her left leg. *Id.* at 69–70. Plaintiff noted that she also hit her shoulder.  
14 *Id.* at 69. Plaintiff described having trouble walking and standing. *Id.* Plaintiff testified  
15 that she has received physical therapy for her hip, lumbar, and shoulder/arm. AR at 69–  
16 70. Plaintiff estimated that the most she could carry would be one gallon of milk. *Id.* at  
17 71–72. Plaintiff denied being able to pick up or carry a case of water. *Id.* at 72.

18           Plaintiff acknowledged seeing Dr. Barlow for an examination, but could not  
19 remember much about what they discussed. *Id.* at 72–74. Plaintiff indicated that she did  
20 not remember hopping on one foot or lifting anything with Dr. Barlow. *Id.* at 73. Plaintiff  
21 testified that she does not remember anything when she has a focal seizure. AR at 74.  
22 Plaintiff described having a seizure while eating lunch with her mother—she remembers  
23 eating lunch, but the next thing she remembers in being in her bed. *Id.* at 74–75. Plaintiff  
24 noted that her mother knows to follow her because Plaintiff's seizures are not obvious. *Id.*  
25 at 75. Plaintiff reported that the number of seizures she has varies from month to month,  
26 and sometimes they happen twice a day, but estimated they occur between at least six (6)  
27 and ten (10) times per month, with some months as high as twenty (20). *Id.* at 75–76.  
28 Plaintiff noted that following a long seizure, she has a headache and requires sleep. *Id.* at

75. Plaintiff reported that her doctor discussed putting some sort of implant in her, but that although it would reduce the severity of her seizures, they would still occur. AR at 76. Plaintiff further reported that the doctor said that the surgery would cause her to lose her memory and require her to learn everything all over again. *Id.* Plaintiff testified that she has been to the Emergency Department and underwent an Electroencephalogram (“EEG”) and Magnetic Resonance Imaging (“MRI”). *Id.* at 77. At the time of the hearing, COVID-19 was impacting hospital stays and testing. *Id.* Plaintiff further testified that her seizures came without warning and did not seem to be brought on by anything specific. *Id.*

Plaintiff reported difficulty staying asleep, despite medication, which results in some daytime fatigue necessitating naps once or twice per week, on average. AR at 77–78. Plaintiff also noted that she has psoriasis, eczema, and a fungal infection, all of which require medication. *Id.* at 78–79. Plaintiff indicated that she had asked her neurologist about the medications that she has been prescribed, but his response was unclear. *Id.*

## **b. Administrative Forms**

### ***i. Seizure Questionnaire—Third Party***

On June 19, 2020, Plaintiff completed a Seizure Questionnaire to Third Party.<sup>4</sup> AR at 254–55. Plaintiff reported that her seizures were witnessed by her parents, siblings, and friends, and noted that she has had seizures for many years but her description was focused on those that had occurred on April and May 2020. *Id.* at 254. Plaintiff outlined the dates and descriptions of her seizure events, as follows:

April 6, 2020 = I lost my consciousness for 6 minutes.

April 9, 2020 = I felt but I didn’t loose [sic] my consciousness

April 14, 2020 = I was sleeping and waking up from my bed without knowing what I am doing. After returning back to my consciousness went back to bed.

April 15, 2020 = I had a seizure without feeling previously. I lost consciousness for a 5 minutes and after it I slept for all day with bad headache.

April 16, 2020 = I had a seizure and I lost my consciousness for 6

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<sup>4</sup> It is unclear why Plaintiff completed this form given its direction to a third party.

1 minutes.

2 May 5, 2020 = I had a seizure without feeling previously. I lost my  
3 consciousness for minutes.

4 May 12, 2020 = I had a seizure without feeling previously I lost my  
5 consciousness and after 3 hours I got another one.

6 May 25, 2020 = I didn't feel previously with any sign I had a seizure  
7 & lost my consciousness & I kept sleeping all day with bad headache. I  
8 woke up next day with headache.

9 *Id.* at 255. Plaintiff estimated that she has between four (4) and five (5) seizures per month.

10 *Id.* at 254. Plaintiff indicated that sometimes she feels that she is going have a seizure, but  
11 sometimes they come on without warning. *Id.* Plaintiff estimated that she witnesses a  
12 seizure around three (3) times per month, with her most recent on June 8, 2020. AR at 254.

13 Plaintiff confirmed that she loses consciousness for approximately five (5) to ten  
14 (10) minutes during a typical seizure. *Id.* Plaintiff indicated that she experiences jerking  
15 and thrashing movements, and described her body movements, as follows:

16 My seizure was witnessed by my sister and parents while I am awake I get  
17 so irritable then I will have seizure, lose my conscious and I will not be able  
18 to see or hear. Could be walking and doing stuff without knowing what I am  
19 doing. Sometimes I rubbed my hand and stare not aware of what is  
20 happening with me.

21 *Id.* at 254–55. Plaintiff reported that sometimes there would be warning signs prior to a  
22 seizure, but other times they would come without warning. *Id.* at 254. Plaintiff noted that  
23 warnings usually include her “heart beat[ing] fast and [she] feel[s] scared that [she] [is]  
24 going to have a seizure.” *Id.* at 255.

25 Plaintiff denied biting her tongue or losing bladder or bowel control during a  
26 seizure. AR at 254. Plaintiff confirmed that she had been injured while seizing, explaining:

27 I took several medications at once without remembering that I took them. I  
28 was hospitalized for that. I fell off the ladder while I had seizure. I was  
hospitalized for that which led for back and leg injury. Also, I felt while I  
was walking during having seizure and without knowing I found myself on  
the floor with my hand and knee bleeding.

1 *Id.* at 254–55. Plaintiff described experiencing severe headaches following a seizure,  
 2 noting they can last up to two (2) days, and also indicated that she feels sleepy afterward,  
 3 which can result in her sleeping all day. *Id.* at 254.

4 *ii. Exertional Daily Activities Questionnaire*

5 On June 19, 2020, Plaintiff completed an Exertional Daily Activities Questionnaire.  
 6 AR at 256–58. Plaintiff reported that she lived in a house with family. *Id.* at 256. Plaintiff  
 7 described her average day to include “stay[ing] home most of the day[,] . . . [and]  
 8 prepar[ing] meals for [her]self if [she] [is] able to do it.” *Id.* Plaintiff further described the  
 9 limitations of her medical conditions as follows:

10 My back hurts most of the time, the pain is extended to both legs which  
 11 prevent me from cleaning, lifting and walking for short distance. I was  
 12 treated by physical therapy but due to Covid-19 it was placed on hold now.  
 13 My physician (Dr. Sheela Bhat) is going to order new request for physical  
 14 therapy treatment.

14 *Id.* Plaintiff indicated that she can walk for approximately one-half mile when she is not  
 15 having pain, and estimated that it takes her thirty (30) to forty (40) minutes. *Id.* Plaintiff  
 16 also estimated that she can lift four (4) pounds, if she does not have pain, and can do so  
 17 twice per day. AR at 258.

18 Plaintiff denied doing her own grocery shopping. *Id.* Plaintiff reported that she  
 19 cleans her bedroom, does her laundry, and dusts for a total of four (4) hours. *Id.* Plaintiff  
 20 noted that she has difficulty finishing chores, because if she stands for thirty (30) minutes,  
 21 she has to stop and rest due to back pain. *Id.* Plaintiff denied driving because of her  
 22 epilepsy. *Id.* Plaintiff indicated that her epilepsy also prevents her from participating in  
 23 outdoor activities, such as swimming or hiking, because she needs someone to be with her.  
 24 AR at 258. Plaintiff confirmed that she does walk around the house three (3) times per  
 25 week. *Id.* Plaintiff reported that she performed these chores prior to the onset of her alleged  
 26 conditions, and noted that she has had to reduce her walking to once per week due to her  
 27 back and leg pain. *Id.*

28 Plaintiff reported sleeping for seven (7) hours, rests three (3) times per day, and naps

1 for approximately one (1) hour per day. *Id.* Plaintiff listed her medications to include  
 2 Aleve and MoveFree Joint Health Advanced (Glucosamine and Chondroitin). *Id.* at 257.  
 3 Plaintiff also noted that she does physical therapy exercises once per day. AR at 257.  
 4 Plaintiff indicated that she wears glasses for a vision impairment and glaucoma, as well as  
 5 a brace for her back pain. *Id.* In response to whether there was anything else Plaintiff  
 6 wanted to tell the Administration about her condition, she stated:

7 I do have Epilepsy in addition to my back and legs pain that will limit any  
 8 activity to drive, swim and do other exercise by myself, the medications that  
 9 I take for epilepsy such as (Keppra) which makes me fatigue and drowsy and  
 10 have deficit in cognition. In addition, I have been taking (tegretol-XR) for  
 11 long time to control my seizure activities which cause as well dizziness and  
 joint pain. A year ago, my neurologist has add new drug called (Onfi) for  
 my seizure which cause me to be tired and sleepy.

12 *Id.*

### 13 ***iii. Work History Report***

14 On June 19, 2020, Plaintiff completed a Work History Report, and reported that she  
 15 did not have a prior work history. AR at 259–66. Plaintiff added the following comments  
 16 in the “Remarks” section of the form:

17 I wasn’t able to work because of my seizure disorder “Epilepsy”, I had it for  
 18 more than 15 years. I am taking several medications to control my seizures  
 19 with no success. My seizures sometimes come without warning and I lose  
 20 my conscious and don’t recall what I am doing during seizure, I don’t hear  
 21 and I can’t see. I do stuff without knowing what I am doing and don’t follow  
 command until the seizures is gone which can last 5 to 10 minutes.  
 Following the seizure I get severe headache which can last up to 2 days and  
 need to sleep.

22 *Id.* at 266.

## 23 **2. Vocational Expert Gloria Lasoff’s Testimony**

24 Ms. Lasoff testified as a vocational expert at the administrative hearing. AR at 13,  
 25 79–82, 191–93, 305. The ALJ noted that Plaintiff had no past relevant work, so the  
 26 discussion would be limited to the possibility of unskilled work. *Id.* at 79. The ALJ asked  
 27 Ms. Lasoff to consider a hypothetical individual of Plaintiff’s age—57 at the time of filing  
 28



1 and 58 at the time of the hearing, education, and past relevant work; who was without  
2 exertional, manipulative, visual, or communicative limitations; could occasionally climb  
3 ramps and stairs; could never climb ladders, ropes, and scaffolds; could frequently balance,  
4 stoop, kneel, and crouch; could occasionally crawl; should avoid concentrated exposure to  
5 extreme cold, to extreme heat, to wetness, to humidity, to noise, to vibration, and to  
6 airborne irritants; and should avoid even moderate exposure to hazardous machinery or  
7 unprotected heights. *Id.* at 79–80. The ALJ enquired about the existence of jobs at the  
8 medium level of exertion that Plaintiff could sustain. *Id.* at 80. Ms. Lasoff confirmed the  
9 availability of qualifying jobs. *Id.*

10 Ms. Lasoff opined that such an individual would be employable as a hand packager,  
11 Dictionary of Occupational Titles (“DOT”) number 920.587-018, with a Specific  
12 Vocational Preparation (“SVP”) of 2, medium exertional level, and of which there are  
13 approximately 78,000 positions in the national economy. AR at 80. Ms. Lasoff further  
14 opined that such an individual would also be able to work as a conveyor feeder, DOT  
15 number 921.686-014, medium exertional level, with an SVP of 2, and approximately  
16 25,000 positions in the national economy. *Id.* Ms. Lasoff also opined that such an  
17 individual would be employable as a kitchen helper, DOT number 318.687-010, medium  
18 exertional level, with an SVP of 2, and of which there are approximately 148,000 jobs in  
19 the national economy. *Id.*

20 The ALJ further enquired regarding the hypothetical individual, but who was having  
21 “absent spells” for ten (10) to fifteen (15) minutes at a time, occurring between six (6) and  
22 twenty (20) times per month, occurring without warning, and leaving Plaintiff with very  
23 little or without recollection of what happened to her. *Id.* at 81. Ms. Lasoff opined that  
24 there would not be any sustainable jobs in a competitive labor market available to such an  
25 individual. *Id.* The ALJ confirmed that the original hypothetical individual, who is also  
26 limited in her ability to be on her feet standing or walking for fifteen (15) minutes at a time  
27 and could reliably lift no more than a gallon of milk, would not be able to sustain light  
28 work, which given her age would eliminate any possible employment for Social Security



1 Disability purposes. AR at 81–82.

### 2 **3. Plaintiff's Medical Records**

#### 3 **a. Treatment records**

4 On August 16, 2017, Plaintiff was seen by David M. Labiner, M.D., who reported  
5 evaluating Plaintiff with Dr. Sim. AR at 312; *see also* AR at 378–80. Dr. Sim indicated  
6 that Plaintiff reported having had seizures on July 12, July 14, July 28, August 11, and  
7 August 16, 2017. AR at 378. Dr. Sim's review of Plaintiff's systems and physical  
8 examination were unremarkable. *Id.* at 380. Dr. Sim noted Plaintiff's baseline as "one  
9 seizure a week or so." *Id.* Dr. Labiner noted that they "discussed an evaluation for surgical  
10 intervention either ablative or a devices [sic] but [Plaintiff] declined to pursue at this time."  
11 *Id.* at 312. Plaintiff reported that "she ha[d] gained considerable weight on Lyrica[.]"  
12 which prompted Dr. Labiner and Dr. Sim to move to replace it with Onfi. *Id.* at 312, 378.

13 On November 21, 2017, Plaintiff was discharged following a fall from a ladder of  
14 approximately ten (10) feet. AR at 381–82. Records reflect that Plaintiff suffered a "[l]oss  
15 of consciousness and then seizure-like activity after [the] fall." *Id.* at 381. Upon EMS  
16 arrival, Plaintiff "was found alert and oriented however was having jerking motions." *Id.*  
17 Subsequent "[x]rays were negative for acute fractures/dislocations." *Id.*

18 On April 3, 2018, Plaintiff returned to Dr. Labiner and Dr. Sim. *Id.* at 383–86.  
19 Records indicate that Dr. Siegal discontinued Lyrica and began Plaintiff on Onfi. AR at  
20 384. Plaintiff reported "a day [in] late February when she felt like she was going to again  
21 have a seizure, but she did not end up having one[,] . . . [and] [s]ince that day she has not  
22 had any episodes." *Id.* Dr. Sim's review of Plaintiff's systems and physical examination  
23 were unremarkable. *Id.* at 385. Dr. Sim's assessment included localization related  
24 epilepsy. *Id.*

25 On September 11, 2018, Plaintiff was evaluated by Dr. Labiner and Urooba Faheem,  
26 M.D. *Id.* at 387–90. Plaintiff reported that on May 25, 2018, "she lost consciousness  
27 without any warning for seconds with no full body shaking[,] . . . [and] felt tired and had a  
28 horrible headache for the next 24 hours for which she took an Advil." AR at 387.

1 Treatment records further reflect that “[a]gain on 06/23/18, she lost consciousness again  
2 momentarily without any premonition[;] [h]er mother mentioned that she was talking to  
3 her parents during the seizure which is new and she has no recollection of this.” *Id.* “Post  
4 ictal phase lasted for about 12-24 hours with headache and fatigue.” *Id.* Plaintiff also  
5 reported “[m]ultiple times in July when she had lapses in consciousness[,]” but no seizures  
6 were reported in August and September. *Id.* Plaintiff indicated that “[s]he continues to  
7 have left sided hip and knee pain since [her] fall [from the ladder].” *Id.* at 387. Dr.  
8 Faheem’s review of Plaintiff’s systems was unremarkable except for numbness in her right  
9 upper extremity in the lateral three (3) fingers. *Id.* at 388. Dr. Faheem’s physical  
10 examination was also generally unremarkable. AR at 388–89. Dr. Faheem’s impressions  
11 included localization related epilepsy and Carpal Tunnel Syndrome. *Id.* at 390.

12 On March 21, 2019, Plaintiff returned to Dr. Labiner for a follow-up. *Id.* at 391–  
13 93. Treatment records noted that “[s]ince her last visit, she has had multiple lapses in  
14 consciousness – once on Nov 14, once on Mar 2, and once on Mar 12.” *Id.* at 391. Plaintiff  
15 “also state[d] that there have been multiple times where she will suddenly find herself  
16 standing and she is not aware of how she got there or what she was doing.” *Id.* Records  
17 further indicate that “[h]er family has told her she also has staring episodes where they  
18 cannot get her to respond.” AR at 391. Dr. Labiner’s review of Plaintiff’s systems and  
19 physical examination were generally unremarkable. *Id.* at 391–93. Dr. Labiner adjusted  
20 Plaintiff’s medication dosages. *Id.* at 393.

21 On May 7, 2019, Plaintiff was seen by Sheela Bhat, M.D., her primary care  
22 physician, for her annual physical. *Id.* at 459–63. Dr. Bhat’s review of Plaintiff’s systems  
23 and physical examination were unremarkable. *Id.* at 460–61.

24 On June 6, 2019, Plaintiff saw David Gooch, DPM regarding a nail fungus on her  
25 left hallux nail. AR at 348–49, 475. On June 20, 2019, Plaintiff followed up with Ryan  
26 Teeple, M.D. at Southern Arizona Ophthalmology regarding her glaucoma. *Id.* at 411–13.  
27 Dr. Teeple’s examination was generally unremarkable. *See id.*

28 On August 20, 2019, Plaintiff returned to Dr. Teeple regarding her glaucoma. *Id.*

1 at 414–15. Treatment records reflect that Plaintiff “did not start Cosopt after last visit as  
2 we had planned.” *Id.* at 415.

3 On October 1, 2019, Plaintiff followed-up with Dr. Labiner. AR at 394–95, 407–  
4 408. Plaintiff reported two (2) seizure since her prior visit in March 2019—one (1) in July  
5 and one (1) in August. *Id.* at 394, 407. Plaintiff reported a trembling feeling prior to both  
6 seizures, that she lost a large period of time with both seizures, and experiencing a headache  
7 afterward that lasted the rest of the day. *Id.* Dr. Labiner’s examination was unremarkable.  
8 *Id.* at 395, 407. On October 21, 2019, Plaintiff followed up with Dr. Teeple regarding her  
9 glaucoma. *Id.* at 416–18. Treatment records reflect that Plaintiff began using Cosopt and  
10 despite “some burning when instilling[,]” she was tolerating it well. AR at 416.

11 On November 7, 2019, Plaintiff returned to Dr. Bhat for a routine follow-up. *Id.* at  
12 455–58. Dr. Bhat’s review of Plaintiff’s systems was unremarkable, as was her physical  
13 examination. *Id.* at 456–57.

14 On December 19, 2019, Plaintiff had radiographs of her pelvis and left hip. *Id.* at  
15 474. Edward Woolsey, M.D. noted the “[m]edullary rod left femur bridging an old  
16 proximal femoral fracture[,]” without more. *Id.* On December 27, 2019, Plaintiff was seen  
17 by Mayer Horensten, D.O. regarding left hip and leg pain. AR at 452–54. Dr. Horensten  
18 noted somewhat diminished deep tendon reflexes in her lower extremities, but “had good  
19 range of motion to both hips without any pain[,] [although] there was some tenderness over  
20 the bursa of the left greater trochanter[,] [and] there was no palpatory tenderness over the  
21 sciatic area.” *Id.* at 452. Dr. Horensten also noted that “the x-ray report of [Plaintiff’s] left  
22 hip . . . showed the medullary rod in good position.” *Id.*

23 On January 10, 2020, Plaintiff had radiographs of her lumbar spine. *Id.* at 473.  
24 Donald Mar, M.D. reviewed Plaintiff’s films and noted “[s]table L1 compression[] [and]  
25 [d]egenerative lumbar spondylosis.” *Id.* On January 27, 2020, Plaintiff was seen at  
26 BodyCentral Physical Therapy regarding her low back pain and left sided knee pain which  
27 developed after her regular gym class. AR at 329–32, 466–72. Plaintiff reported  
28 significant pain, not controlled by over the counter medication, as well as difficulty

1 performing daily activities due to pain. *Id.* at 329, 331, 466, 469. Treatment records reflect  
2 that Plaintiff “demonstrate[d] pelvic obliquity and referred pain patterns from glutes and  
3 L[eft] SIJ [(sacroiliac joint)] that may significantly limit her ability to perform functional  
4 mobility and participate in recreation.” *Id.* Records further reflect that Plaintiff’s last  
5 seizure was fifteen (15) days prior. *Id.* at 331, 466. On January 30, 2020, Plaintiff returned  
6 to BodyCentral Physical Therapy for treatment. *Id.* at 327–28. Plaintiff reported “having  
7 pain in L[eft] hip going down thigh to just above knee[,] . . . [and] sometimes she has pain  
8 on R[ight] side as well.” AR at 327. Treatment records note that Plaintiff “had good  
9 tolerance with activities today[,]” and “had good form and technique[.]” *Id.* Plaintiff  
10 reported increased symptoms in her hips and low back with standing hip abduction and  
11 extension. *Id.*

12 On February 5, 2020, Plaintiff was again seen at BodyCentral Physical Therapy. *Id.*  
13 at 325–26. Plaintiff reported pain in her right hip “since last session after doing standing  
14 hip abd[uction] exercises.” *Id.* at 325. Treatment records reflect “elevated tension in  
15 R[ight] glute/piriformis musculature.” AR at 325. Records further reflect Plaintiff “had  
16 good tolerance with activities[,]” and was able to complete TRX squats and side stepping  
17 without increased pain or other issues. *Id.* On February 7, 2020, Plaintiff returned for  
18 further physical therapy. *Id.* at 323–24. Plaintiff reported decreased right hip pain. *Id.* at  
19 323. Treatment records reflect that Plaintiff “presented with improved muscular tension in  
20 glute/piriformis musculature as compared to prior session.” *Id.* Records also reflect the  
21 addition of resistance bands to side stepping which Plaintiff tolerated. *Id.* On February  
22 11, 2020, Plaintiff was seen for physical therapy and reported “improved L[eft] low back  
23 pain yet increased R[ight] groin pain.” AR at 321. Treatment records indicate that Plaintiff  
24 “demonstrate[d] improved pelvic obliquity[,] . . . [and] significant sensitivity/tenderness in  
25 L[eft] hip musculature at this time.” *Id.* On February 13, 2020, Plaintiff returned to  
26 physical therapy and “report[ed] feeling very sore . . . in low back and R[ight] groin.” *Id.*  
27 at 319. Treatment records note that she “was very tender with manual today and only  
28 tolerated lighter pressure as compared to previous sessions.” *Id.* On February 18, 2020,

1 Plaintiff was seen for a physical therapy appointment and “report[ed] increased low back  
2 pain although she didn’t do much over the weekend.” *Id.* at 317. Treatment records reflect  
3 continued “poor pelvic stabilization.” AR at 317. On February 20, 2020, Plaintiff had  
4 another physical therapy appointment and “report[ed] that the side and backs of her legs  
5 [we]re hurting[,]” and “that she went for a walk and started to feel some soreness  
6 afterwards.” *Id.* at 315. Treatment records note that Plaintiff “had good tolerance with  
7 activities[,] . . . was tender in L[eft] IT [(iliotibial)] band[,] . . . [and] had improved pelvic  
8 alignment following pelvic distraction.” *Id.*

9 On March 1, 2020, Plaintiff was seen at the Emergency Department of Carondelet  
10 Health Network. *Id.* at 357–66. Plaintiff was discharged on March 2, 2020. *Id.* at 367–  
11 68. Treatment records reflect Plaintiff “came in . . . after a seizure and accidental drug  
12 overdose.” AR at 357. Records indicate that “[j]ust prior to arrival [Plaintiff] had a  
13 seizure[,] . . . [and] [w]hen she is postictal she tends to pick at things[,] . . . when she finally  
14 came around noticed that her bottle of Onfi was empty.” *Id.* at 357, 362. Plaintiff did “not  
15 remember how many tablets were left in the bottle.” *Id.* at 357. Review of Plaintiff’s  
16 systems reflect that she suffered dizziness and an altered level of consciousness, but  
17 otherwise unremarkable. *Id.* Physical examination of Plaintiff was similarly  
18 unremarkable. *Id.* at 358–59. Records further reflect Plaintiff’s EKG showed nonspecific  
19 T wave abnormalities. *See* AR at 359, 365, 370. Plaintiff was admitted overnight for  
20 observation due to the medication’s long half-life. *Id.* at 361; *see also* AR at 365–66.  
21 Plaintiff underwent a CT scan without contrast. AR at 365, 376, 396. David Jeck, M.D.  
22 reviewed the same and did not find any significant intracranial abnormality. *Id.* at 376,  
23 396. Additionally, while Plaintiff was hospitalized, Michael Epstein, M.D. evaluated her  
24 and recorded her history as follows:

25 Th[is] is a nearly 57-year-old right-handed woman of Lebanese  
26 descent who developed seizures at the time of her menarche. Initially she  
27 described tonic-clonic activity long postictal fatigue lasting a day or more,  
28 but over time she evolved to partial seizures. She might have a prodrome of  
the headache and aura of rapid heartbeat or fear or anxiety followed by a  
fugue-like state during which she might perform random obviously worthless

1 activities. And [sic] auxiliary historian was with her and said that she could  
2 tell when her patient went into a seizure, but there are no clear-cut  
3 automatisms, adverse reactions or autonomic changes. Spells [e]nd  
4 quickly and postictal confusion is very brief. Frequency is variable and she  
5 listed gaps of 1, 2 or 3 weeks but it seems she rarely goes a full month without  
6 seizures.

7 She is followed by a sophisticated subspecialist/epileptologist, Dr.  
8 Labiner, and she has had numerous medication changes over time. She had  
9 one that affected her vision, possibly vigabatrin but she remembers many  
10 medications and they run together, somewhat understandably. She was  
11 offered evaluation for epilepsy surgery but rejected it based on the possibility  
12 of memory changes or other complications.

13 *Id.* at 367. Plaintiff's discharge summary indicates that Plaintiff took the rest of her  
14 Clobazam prescription, not Onfi as reflected in the Emergency Department records.  
15 *Compare* AR at 397, *with* AR at 357.

16 On May 28, 2020, Plaintiff saw Dr. Labiner and Sanchari Datta, M.D. for a follow-  
17 up. AR at 399–401, 403–404. Treatment records indicate that Plaintiff reported “multiple  
18 seizures with loss of consciousness, anywhere from 1–4 seizures a month[,]” since the  
19 previous November. *Id.* at 399, 403. Plaintiff further reported additional “episodes where  
20 she would [feel] a seizure coming on and maybe have a headache but not lose  
21 consciousness.” *Id.* Plaintiff reported increased anxiety, as well as daily headaches. *Id.* at  
22 400, 403. Plaintiff's sister attended the appointment via telephone and state[d] that Plaintiff  
23 “has been extremely irritable which is very unlike her usual self.” *Id.* at 399–400, 403.  
24 Records indicate that Plaintiff's “sister is very guarded about patient's low sodium level  
25 and mentions that her memory has been getting worse as well[,] [and] . . . is extremely  
26 concerned that her sister is getting worse.” AR at 400, 403. Dr. Datta's review of  
27 Plaintiff's systems and physical examination were unremarkable. *Id.* at 400, 404. Dr.  
28 Labiner adjusted Plaintiff's medications. *Id.*

On June 4, 2020, Plaintiff returned to Dr. Teeple for a follow-up regarding her  
glaucoma. *Id.* at 419–23, 429–31. Plaintiff underwent Optical Coherence Tomography  
 (“OCT”), as well as Optic Nerve Tomography. *Id.* at 419–20, 429–30. Dr. Teeple's



1 findings included nerve fiber layer loss, but this was stable compared to previous studies.  
2 AR at 420, 430. Dr. Teeple's also reviewed Plaintiff's interocular pressure ("IOP") results.  
3 *Id.* at 419, 429. On June 9, 2020, Plaintiff was seen by Sheela Bhat, M.D. for her annual  
4 physical. *Id.* at 447–51. Plaintiff reported having had "several seizures" and neurology  
5 increased her Onfi dosage. *Id.* at 448. Dr. Bhat's review of Plaintiff's systems was  
6 unremarkable, as was her physical examination. *Id.* at 448–49. Dr. Bhat's assessment  
7 included mixed hyperlipidemia, prediabetes, absences seizures, glaucoma, and obesity.  
8 AR at 447.

9 On November 30, 2020, Plaintiff was seen by Ayesha Javed, M.D. to establish care.  
10 *Id.* at 593–95. Dr. Javed's review of Plaintiff's systems was unremarkable, except for  
11 lesions on her right elbow and big toe which were being treated by dermatology. *Id.* at  
12 594. Dr. Javed's physical examination of Plaintiff was similarly unremarkable, and she  
13 further observed that no specific lesion was noted on Plaintiff's elbow. *Id.*

14 On December 17, 2020, Plaintiff was seen by Mannix Consolacion, NP-C regarding  
15 psoriasis and nail fungus. *Id.* at 540–45. NP Consolacion's examination was generally  
16 unremarkable. AR at 540.

17 On January 14, 2021, Plaintiff returned to NP Consolacion for a follow-up. *Id.* at  
18 546–51. Aside from Plaintiff's ongoing psoriasis and nail fungus, NP Consolacion's  
19 examination was generally unremarkable. *Id.* at 546. NP Consolacion also performed  
20 punch two (2) punch biopsies of Guttate papules, one (1) on Plaintiff's right posterior upper  
21 arm and one (1) on her right superior medial midback. *Id.* at 547. On January 25, 2021,  
22 Plaintiff saw Dr. Teeple for a follow-up regarding her glaucoma. *Id.* at 574–76. Dr.  
23 Teeple's examination was generally unremarkable. *See* AR at 574–76.

24 On February 2, 2021, Plaintiff followed up with NP Consolacion. *Id.* at 552–57.  
25 NP Consolacion's examination of Plaintiff was generally unremarkable. *Id.* at 552.  
26 Treatment records indicate that Plaintiff had "[e]rythematous papules distributed on the  
27 right posterior upper arm, left posterior upper arm, right thigh, and left thigh." *Id.* at 552.  
28 These were assessed as spongiotic dermatitis. *Id.* Plaintiff's nail fungus remained



1 unchanged, and NP Consolacion noted Plaintiff suffered from inadequately controlled dry  
2 skin. AR at 553.

3 On March 8, 2021, Plaintiff underwent a routine mammogram. *Id.* at 592. Danielle  
4 Carroll, M.D. found no significant change from prior films. *Id.*

5 On May 3, 2021, Plaintiff again returned to NP Consolacion. *Id.* at 558–64. NP  
6 Consolacion’s examination of Plaintiff was generally unremarkable. *Id.* at 558. Records  
7 reflect that Plaintiff’s spongiotic dermatitis was confirmed by the biopsies. AR at 558–59.

8 On June 2, 2021, Plaintiff returned to Dr. Javed for a follow-up. *Id.* at 585–88. Dr.  
9 Javed’s review of Plaintiff’s systems was positive for skin itching and rash, but was  
10 otherwise unremarkable. *Id.* at 589. Physical examination was similarly unremarkable.  
11 *Id.* at 590. Dr. Javed noted that Plaintiff’s psoriasis was being followed by dermatology,  
12 and her epilepsy was well-controlled and followed by neurology. *Id.* at 590.

13 On July 26, 2021, Plaintiff returned to Dr. Teeple for a follow-up regarding her  
14 glaucoma. AR at 577–84. Dr. Teeple’s examination was generally unremarkable and  
15 indicated that Plaintiff’s conditions remained stable. *See id.* at 577–80.

16 **b. Consultative Examiner Robert B. Barlow, M.D.**

17 On January 23, 2021, Robert B. Barlow, M.D. examined Plaintiff at the request of  
18 the Arizona Department of Economic Security (“AZDES”). AR at 516–26. Dr. Barlow  
19 observed that Plaintiff “seem[ed] to be a reliable historian[,]” and reviewed Plaintiff’s  
20 history of back pain, epilepsy, and high cholesterol. *Id.* at 517, 524. Dr. Barlow listed  
21 Plaintiff’s medication to include keppra, Onfi, dorzolamide HCL, atorvastatin, meloxicam,  
22 alendronate, Tegretol, and latanoprost/timolol maleate. *Id.* at 518. Dr. Barlow’s review of  
23 Plaintiff’s systems was unremarkable. *Id.* at 519. Dr. Barlow’s physical examination was  
24 also generally unremarkable. *Id.* at 519–23. Dr. Barlow reported that his clinical  
25 examination found that Plaintiff “ha[d] no significant abnormalities.” AR at 524. Dr.  
26 Barlow concluded that Plaintiff showed “no overt evidence of acute or chronic physical  
27 illness and [her] mental status was otherwise stable today.” *Id.*

28 Dr. Barlow noted that “[w]hen asked about her [back] pain, [Plaintiff] said it was

7/10 in her lower back and right hip at the beginning of the exam, and 8/10 at the end.” *Id.* Dr. Barlow opined that Plaintiff “was able to perform all of the requested maneuvers without difficulty . . . [and] was in no acute distress.” *Id.* Dr. Barlow observed that Plaintiff “has had uncontrolled epilepsy for more than 20 years and has seen a physician for this condition.” *Id.* Dr. Barlow described Plaintiff’s symptoms to “include having sudden multiple seizures, loss of consciousness, and loss of memory[,] [with] [h]er most recent seizure [occurring] last week.” AR at 524. Dr. Barlow also noted Plaintiff’s history of high cholesterol, which was being treated with medication. *Id.* Dr. Barlow opined that Plaintiff did not have any limitations in her ability to sit, stand, walk, lift, carry, bend, squat, reach, handle, feel, grasp, see, and communicate. *Id.* at 524–25. Dr. Barlow further opined that Plaintiff did not have any environmental limitations. *Id.* at 525.

Dr. Barlow also completed a Medical Source Statement of Ability to Do Work-Related Activities (Physical). *Id.* at 527–30. Dr. Barlow found “no significant abnormalities.” AR at 527. Dr. Barlow left the remainder of the form blank. *Id.* at 527–30.

### c. Reviewing physicians

#### i. D. Mirza, M.D.

On July 20, 2020, Dr. Mirza performed an initial review Plaintiff’s medical records. AR at 86–95. Dr. Mirza considered Plaintiff’s impairments to include epilepsy and other and unspecified arthropathies. *Id.* at 91. Dr. Mirza required seizure precautions in Plaintiff’s residual functional capacity. *Id.* at 92, 94.

#### ii. C. Combs, M.D.

On February 10, 2021, Dr. Combs performed a review of Plaintiff’s medical records upon reconsideration. AR at 96–112. Dr. Combs’s findings were consistent with Dr. Mirza’s initial assessment. *See id.*

## II. STANDARD OF REVIEW

The factual findings of the Commissioner shall be conclusive so long as they are

1 based upon substantial evidence and there is no legal error. 42 U.S.C. §§ 405(g),  
 2 1383(c)(3); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008). This Court may  
 3 “set aside the Commissioner’s denial of disability insurance benefits when the ALJ’s  
 4 findings are based on legal error or are not supported by substantial evidence in the record  
 5 as a whole.” *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted); *see*  
 6 *also Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). “Under  
 7 the substantial evidence standard, a court looks to an existing administrative record and  
 8 asks whether it contains ‘sufficien[t] evidence’ to support the agency’s factual  
 9 determinations.” *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019) (citations omitted)  
 10 (alterations in original).

11 Substantial evidence is “‘more than a mere scintilla[,] but not necessarily a  
 12 preponderance.’” *Tommasetti*, 533 F.3d at 1038 (quoting *Connett v. Barnhart*, 340 F.3d  
 13 871, 873 (9th Cir. 2003)); *see also Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014).  
 14 Further, substantial evidence is “such relevant evidence as a reasonable mind might accept  
 15 as adequate to support a conclusion.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).  
 16 Where “the evidence can support either outcome, the court may not substitute its judgment  
 17 for that of the ALJ.” *Tackett*, 180 F.3d at 1098 (citing *Matney v. Sullivan*, 981 F.2d 1016,  
 18 1019 (9th Cir. 1992)); *see also Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007).  
 19 Moreover, the court may not focus on an isolated piece of supporting evidence, rather it  
 20 must consider the entirety of the record weighing both evidence that supports as well as  
 21 that which detracts from the Secretary’s conclusion. *Tackett*, 180 F.3d at 1098 (citations  
 22 omitted).

### 23 24 **III. ANALYSIS**

#### 25 **A. *The Five-Step Evaluation***

26 The Commissioner follows a five-step sequential evaluation process to assess  
 27 whether a claimant is disabled. 20 C.F.R. § 404.1520(a)(4). This process is defined as  
 28 follows: Step One asks is the claimant “doing substantial gainful activity[?]” 20 C.F.R. §

1 404.1520(a)(4)(i). If yes, the claimant is not disabled. Step Two considers if the claimant  
 2 has a “severe medically determinable physical or mental impairment[.]” 20 C.F.R. §  
 3 404.1520(a)(4)(ii). If not, the claimant is not disabled. Step Three determines whether the  
 4 claimant’s impairments or combination thereof meet or equal an impairment listed in 20  
 5 C.F.R. Pt. 404, Subpt. P, App.1. 20 C.F.R. § 404.1520(a)(4)(iii). If not, the claimant is  
 6 not disabled. Step Four considers the claimant’s residual functional capacity and past  
 7 relevant work. 20 C.F.R. § 404.1520(a)(4)(iv). If claimant can still do past relevant work,  
 8 then he or she is not disabled. Step Five assesses the claimant’s residual functional  
 9 capacity, age, education, and work experience. 20 C.F.R. § 404.1520(a)(4)(v). If it is  
 10 determined that the claimant can make an adjustment to other work, then he or she is not  
 11 disabled. *Id.*

12 In the instant case, the ALJ found that Plaintiff had not engaged in substantial  
 13 gainful activity since her application date of May 6, 2020. AR at 15. At step two of the  
 14 sequential evaluation, the ALJ found that “[t]he claimant has the following severe  
 15 impairment: epilepsy (20 CFR 416.920(c)).” *Id.* At step three, the ALJ further found that  
 16 “[t]he claimant does not have an impairment or combination of impairments that meets or  
 17 medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart  
 18 P, Appendix 1 (20 CFR 416.920(d), 416.925 and 416.926).” *Id.* at 16. Prior to step four  
 19 and “[a]fter careful consideration of the entire record,” the ALJ determined that “the  
 20 claimant has the residual functional capacity to perform a full range of work at all  
 21 exertional levels but with the following nonexertional limitations: can occasionally climb  
 22 ramps and stairs, and never climb ladders, ropes, or scaffolds; frequently balance, stoop,  
 23 kneel, and crouch; and occasionally crawl[;] [s]he has no manipulative, visual, or  
 24 communication limitations[;] . . . should avoid concentrated exposure to extreme cold,  
 25 extreme heat, wetness, humidity, noise, vibrations, and airborne irritants[;] . . . [and] should  
 26 avoid even moderate exposure to hazardous machinery and unprotected heights.” *Id.* at  
 27 17–18. At step four, the ALJ found that “[t]ransferability of job skills is not an issue  
 28 because the claimant does not have past relevant work (20 CFR 416.968).” *Id.* at 19. At

1 step five, the ALJ found that after “[c]onsidering the claimant’s age, education, work  
 2 experience, and residual functional capacity, there are jobs that exist in significant numbers  
 3 in the national economy that the claimant can perform (20 CFR 416.969 and 416.969a).”  
 4 AR at 19. Accordingly, the ALJ determined that Plaintiff was not disabled. *Id.* at 20.

### 5 ***B. Plaintiff’s Symptom Testimony***

6 Plaintiff asserts that the ALJ failed to “articulate clear and convincing reasons to  
 7 disregard symptom testimony[.]” Opening Br. (Doc. 16) at 8–10. Defendant argues that  
 8 “[s]ubstantial evidence supported the ALJ’s finding that inconsistencies between  
 9 Plaintiff’s statements to treatment providers and her allegations to the SSA undermined her  
 10 symptom testimony.” Response (Doc. 20) at 9. The Court agrees with Plaintiff.

#### 11 **1. Legal Standard**

12 An ALJ must engage in a two-step analysis to evaluate a claimant’s subjective  
 13 symptom testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035–36 (9th Cir. 2007). First,  
 14 “a claimant who alleges disability based on subjective symptoms ‘must produce objective  
 15 medical evidence of an underlying impairment which could reasonably be expected to  
 16 produce the pain or other symptoms alleged[.]’” *Smolen v. Chater*, 80 F.3d 1273, 1281–  
 17 82 (9th Cir. 1996) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (*en banc*)  
 18 (internal quotations omitted)); *see also Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir.  
 19 2014). Further, “the claimant need not show that h[is] impairment could reasonably be  
 20 expected to cause the severity of the symptom [h]e has alleged; [h]e need only show that it  
 21 could reasonably have caused some degree of the symptom.” *Smolen*, 80 F.3d at 1282  
 22 (citations omitted); *see also Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). “Nor  
 23 must a claimant produce ‘objective medical evidence of the pain or fatigue itself, or the  
 24 severity thereof.’” *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014) (quoting  
 25 *Smolen*, 80 F.3d at 1282). “[I]f the claimant meets this first test, and there is no evidence  
 26 of malingering, ‘the ALJ can reject the claimant’s testimony about the severity of h[is]  
 27 symptoms only by offering specific, clear and convincing reasons for doing so.’”  
 28 *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen*, 80 F.3d at 1281); *see also Burrell v.*

1 *Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014) (rejecting the contention that the “clear and  
 2 convincing” requirement had been excised by prior Ninth Circuit case law). “This is not  
 3 an easy requirement to meet: ‘The clear and convincing standard is the most demanding  
 4 required in Social Security cases.’” *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm’r*  
 5 *of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

## 6 **2. Analysis**

7 The ALJ acknowledged the two-step process for assessing Plaintiff’s symptom  
 8 testimony. AR at 18. Next, the ALJ acknowledged Plaintiff’s assertion in her Disability  
 9 Report that “she is unable to work due to back pain, epilepsy, and high cholesterol[.]” *Id.*  
 10 (citations omitted). The ALJ then concluded “[a]fter careful consideration of the evidence,  
 11 the undersigned finds that the claimant’s medically determinable impairment could  
 12 reasonably be expected to cause the alleged symptoms; however, the claimant’s statements  
 13 concerning the intensity, persistence and limiting effects of these symptoms are not entirely  
 14 consistent with the medical evidence and other evidence in the record for the reasons  
 15 explained in this decision.” *Id.* The ALJ considered Plaintiff’s allegations, responses to  
 16 administrative inquiry, and medical records. *See id.* at 18–19.

17 In discounting Plaintiff’s symptom testimony, the ALJ observed that regarding  
 18 Plaintiff’s “allegation of the frequency of seizures that have escalated, since the protective  
 19 filing date,” he could “not find consistent evidence of the frequency, intensity, or duration  
 20 of these alleged spells to include her prior statements to her doctors and to the Social  
 21 Security Administration. *Id.* at 18. The ALJ continued, “[f]or example, the claimant  
 22 testified that she has 6–20 dyscognitive/absence spells a month, averaging about 10 or more  
 23 per month, and lasting 10–15 minutes at a time.” AR at 18. The ALJ did not acknowledge  
 24 that Plaintiff also testified that “[l]ike a month, sometimes like it happens like seizure  
 25 happen to me two times like same day[,] [a]nd sometimes one . . . each month is different  
 26 than the other.” *Id.* at 75. It is unclear from Plaintiff’s hearing testimony whether she was  
 27 including multiple seizures in a single day in her total count, or whether she was referring  
 28 to the number of days in a month that seizures occurred, or if she made some other

1 calculation to arrive at her estimate. Further, March 21, 2019 treatment records from Dr.  
2 Labiner noted that “[s]ince her last visit, she has had multiple lapses in consciousness –  
3 once on Nov 14, once on Mar 2, and once on Mar 12.” *Id.* at 391. Plaintiff “also state[d]  
4 that there have been multiple times where she will suddenly find herself standing and she  
5 is not aware of how she got there or what she was doing.” *Id.* By May 28, 2020, Plaintiff  
6 reported “multiple seizures with loss of consciousness, anywhere from 1–4 seizures a  
7 month[,]” since the previous November. *Id.* at 399, 403. Plaintiff further reported  
8 additional “episodes where she would [feel] a seizure coming on and maybe have a  
9 headache but not lose consciousness.” AR at 399, 403. Plaintiff reported increased  
10 anxiety, as well as daily headaches. *Id.* at 400, 403. Plaintiff’s sister attended the  
11 appointment via telephone, and Drs. Labiner and Datta noted that she “[wa]s extremely  
12 concerned that her sister is getting worse.” *Id.* at 400, 403.

13 The ALJ also noted that “[t]here is no recorded recitation of witnessed seizures in  
14 the record.” *Id.* at 18. This statement is incorrect. On March 2, 2020, Michael Epstein,  
15 M.D. evaluated Plaintiff and noted, “[a]n[] auxiliary historian was with [Plaintiff] and said  
16 that she could tell when her patient went into a seizure, but there are no clear-cut  
17 automatisms, adverse reactions or autonomic changes.” *Id.* at 367. Defendant discounts  
18 this witness statement because “the third party had no apparent observations or details  
19 about what a seizure entailed.” Response (Doc. 20) at 11. The ALJ did not even  
20 acknowledge that a witness statement exists, let alone fault it for not being clear enough.  
21 *See Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225–26 (9th Cir. 2009) (citations  
22 omitted) (“Long-standing principles of administrative law require us to review the ALJ’s  
23 decision based on the reasoning and factual findings offered by the ALJ—not *post hoc*  
24 rationalizations that attempt to intuit what the adjudicator may have been thinking.”).  
25 Accordingly, there is evidence in the medical records that Plaintiff’s seizures have been  
26 witnessed.

27 Finally, the ALJ found Plaintiff’s response “in June 2020 that she was having 4-5  
28 seizures a month, lasting 5-10 minutes each” inconsistent with her statement to “her doctor



1 that she was having 1-4 seizures per month in May 2020[.]” AR at 19 (citations omitted).  
 2 This difference does not constitute an inconsistency, especially where her medical records  
 3 consistently delineate Plaintiff’s varying levels of seizure activity. Substantial evidence  
 4 does not support the ALJ’s finding.

5 The Court is also concerned regarding a potential language barrier. At the  
 6 administrative hearing, Plaintiff’s counsel informed the ALJ that although Plaintiff “speaks  
 7 very good English[,] [h]er native language is Lebanese Arabic.” *Id.* at 65. Counsel further  
 8 noted that “[t]here may be sometimes when she needs further clarification, but I think she’ll  
 9 be okay in English today.” *Id.* Generally, Plaintiff did not appear to have difficulty  
 10 communicating at the hearing; however, during counsel’s inquiry into the number of  
 11 seizures she experienced in a month, Plaintiff misunderstood the question. *See id.* at 75.  
 12 Counsel attempted to rephrase his question, but it remains unclear whether she fully  
 13 understood despite her response. *See id.* Furthermore, Plaintiff’s self-completion of the  
 14 Seizure Questionnaire to Third Party suggests a misunderstanding regarding to whom the  
 15 form was directed. This occurred prior to her current counsel’s involvement in the case.

16 The Court finds that the ALJ failed to provide specific, clear and convincing reasons  
 17 for discounting Plaintiff’s testimony which is supported by substantial evidence in the  
 18 record. *See Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007); *Tommasetti v.*  
 19 *Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008). The Court further finds that this error was  
 20 not harmless.

### 21 **C. Listing 11.02**

22 Plaintiff asserts that the ALJ erred in finding that Listing 11.02 was not met because  
 23 she did not meet the requirement of Listing 11.00.H.2. regarding a detailed third-party  
 24 description of one of her seizures. Opening Br. (Doc. 16) at 6.

25 As noted in Section III.B.2., *supra*, the ALJ did not acknowledge the witness  
 26 statement provided to Dr. Epstein in March 2020. The Court declines to make a finding  
 27 regarding whether this statement is sufficient to meet the Listing 11.02 requirements;  
 28 however, it will direct the ALJ to reconsider this issue on remand.

1           **D.     Remand**

2           “‘[T]he decision whether to remand the case for additional evidence or simply to  
3     award benefits is within the discretion of the court.’” *Rodriguez v. Bowen*, 876 F.2d 759,  
4     763 (9<sup>th</sup> Cir. 1989) (*quoting Stone v. Heckler*, 761 F.2d 530, 533 (9<sup>th</sup> Cir. 1985)). “Remand  
5     for further administrative proceedings is appropriate if enhancement of the record would  
6     be useful.” *Benecke v. Barnhart*, 379 F.3d 587, 593 (9<sup>th</sup> Cir. 2004) (*citing Harman v.*  
7     *Apfel*, 211 F.3d 1172, 1178 (9<sup>th</sup> Cir. 2000)). Conversely, remand for an award of benefits  
8     is appropriate where:

9           (1) the ALJ failed to provide legally sufficient reasons for rejecting the  
10          evidence; (2) there are no outstanding issues that must be resolved before a  
11          determination of disability can be made; and (3) it is clear from the record  
12          that the ALJ would be required to find the claimant disabled were such  
13          evidence credited.

14          *Benecke*, 379 F.3d at 593 (citations omitted). Where the test is met, “we will not remand  
15          solely to allow the ALJ to make specific findings. . . . Rather, we take the relevant testimony  
16          to be established as true and remand for an award of benefits.” *Id.* (citations omitted); *see*  
17          *also Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). “Even if those requirements are  
18          met, though, we retain ‘flexibility’ in determining the appropriate remedy.” *Burrell v.*  
19          *Colvin*, 775 F.3d 1133, 1141 (9<sup>th</sup> Cir. 2014).

20          Here, the ALJ committed legal error in assessing Plaintiff’s symptom testimony.  
21          Additionally, the Court finds it appropriate to direct the ALJ to reassess whether Plaintiff  
22          meets the requirements of Listing 11.02. These analyses requires reconsideration of all  
23          evidence in this case, including any additional evidence that Plaintiff may submit. As such,  
24          the Court recommends remand on an open record.

25           **IV.   CONCLUSION**

26          Based on the foregoing, the Court finds the ALJ committed legal error in assessing  
27          Plaintiff’s symptom testimony. The ALJ also committed error in assessing the evidence  
28          relevant to Listing 11.02. Such error requires reversal and remand, and the Court will direct

1 reanalysis on an open record.

2 Accordingly, **IT IS HEREBY ORDERED** that the Commissioner's decision is  
3 **REVERSED** and **REMANDED** for further consideration.

4 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment and  
5 close its file in this case.

6  
7 Dated this 20th day of March, 2024.

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10 Eric J. Markovich  
11 United States Magistrate Judge  
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